

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

**FILE:** B-215623

**DATE:** November 23, 1984

**MATTER OF:** Surgical Instrument Company of  
America

**DIGEST:**

1. A bid on a total small business set-aside indicating that bidder as a regular dealer, would not supply items manufactured by a small business concern was properly determined nonresponsive due to failure to submit binding promise to meet set-aside requirement, even though a small business was listed in the "Place of Performance" clause and elsewhere in the bid.
2. A nonresponsive bid may not be "clarified" after bid opening to make it responsive since to permit this would be tantamount to permitting the submission of a new bid.

Surgical Instrument Company of America (SICOA) protests the rejection of its bid as nonresponsive to the small business requirements under Defense Logistics Agency (DLA) invitation for bids (IFB) No. DLA120-84-B-0822, a total small business set-aside for the purchase of forceps.

We deny the protest.

Eleven bids were received in response to the IFB. After the four lowest priced bids were rejected because the bidders failed to qualify as small business concerns, SICOA was next low. Although SICOA indicated in clause K78 of its bid that it was a small business concern, it represented that the supplies to be furnished "will not be manufactured or produced by a small business concern." SICOA also represented in clause K79 that it was bidding as a regular dealer, not as a manufacturer of the supplies offered. Finally, SICOA completed clause K39, "Place of Performance," as follows:

"See Confidential Letter  
Enclosed

Forgings and  
Machining

SICOA  
469 Jane St.  
Fort Lee, NJ 07042  
201/947-4411

Manufacturer"

030615

The referenced letter stated:

"Please be advised that the items marked 'See Confidential Letter Enclosed' on page 15 of the above referenced solicitation is as follows:

- 2% - steel: England
- 15% - forgings: England
- 22% - machining, grinding: Pakistan
- 61% - hardening, passivation, polish, finishing, setting, cleaning, marking, testing, packaging: USA"

The contracting officer informed SICOA that its bid was rejected as nonresponsive. Award was made to the next low bidder, Columbia Surgical Instrument Co., Inc. (Columbia). The notice to SICOA of award to Columbia stated:

"Because of ambiguous representations it could not be determined from your bid were the supplies to be furnished thereunder were to be manufactured or produced by small business concerns."

In its protest to this Office, SICOA contended that its typist checked incorrect boxes in clauses K78 and K79 of its bid. SICOA further argued that other provisions of its bid and the enclosed confidential letter clearly indicated its intention to furnish a small business product. According to SICOA, its bid could have been clarified by DLA and such clarification would not have been a material change in the bid.

A bid on a total small business set-aside must establish the bidder's legal obligation to furnish supplies manufactured or produced by a small business concern.

Culligan, Inc., 58 Comp. Gen. 307 (1979), 79-1 C.P.D.

¶ 149. We believe that SICOA's bid was found properly to be nonresponsive. SICOA represented that it was a regular dealer, rather than a manufacturer, and that the medical supplies would not be manufactured by a small business. The failure of SICOA to express its intention in its bid and to thereby submit a binding promise to meet the small business

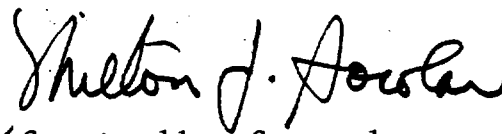
set-aside requirement was sufficient to render the bid nonresponsive. See Prestex, Inc., 59 Comp. Gen. 140 (1979), 79-2 C.P.D. ¶ 411. Also, to permit SICOA to clarify its bid after bid opening and to thereby make it responsive would be tantamount to permitting the submission of a new bid. J.T. Systems, Inc., B-213308, Mar. 7, 1984, 84-1 C.P.D. ¶ 277.

SICOA contends that other provisions of its bid and the enclosed letter indicate its intention to comply with the small business requirement. We do not view these representations as obligating SICOA to comply with the requirement in view of the contrary representation in the clause intended for that purpose. At best, SICOA's completion of these clauses created an ambiguity which required rejection of the bid as nonresponsive. Prestex, Inc., 59 Comp. Gen. 140, 79-2 C.P.D. ¶ 411 at 3.

Finally, SICOA argues that under another IFB, which was also a small business set-aside, "the same contracting officer permitted a material change of supplier and a format change of production for Healthmed Company between the time of bid opening and award." SICOA contends that not allowing a change in its bid is "arbitrary and discriminatory" in light of the alleged change allowed under the previous procurement.

DLA explains that under the previous procurement, since Healthmed Company (Healthmed) represented itself to be a small business concern and a manufacturer of the solicited supplies, that firm's bid was determined to be responsive to the small business set-aside requirement. Communications after bid opening, between DLA and Healthmed, were for the purpose of determining Healthmed's responsibility. In fact, the Small Business Administration issued a determination that Healthmed did not qualify as a small business concern. That determination was not appealed and Healthmed's bid was rejected. Therefore, there is no merit to SICOA's allegation that the treatment of its bid was discriminatory.

Accordingly, the protest is denied.

*for*   
Comptroller General  
of the United States